

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
GABLE, : Docket #13cv5928  
Plaintiff, :  
- against - : New York, New York  
SA MIDTOWN LLC, et al., : January 9, 2014  
Defendants. :  
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PROCEEDINGS BEFORE  
THE HONORABLE PAUL CROTTY,  
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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E X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
None				

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
None				

THE CLERK: American Lecithin Company, et al. v. Rebmann, case number 12cv929. Counsel, please state your appearance for the record.

MR. GREGORY HAUSER: Yes, for plaintiffs Gregory Hauser, H-A-U-S-E-R, Wuersch & Gering.

MR. SAMUEL GOLDMAN: And for defendant Samuel Goldman of Samuel Goldman & Associates.

THE COURT: Good morning, this is Judge Fox. I -

MR. HAUSER: Good morning, Your Honor.

THE COURT: -- reviewed the submissions made by the parties in connection with the defendant's application to amend the answer and to assert new claims, and before I've disposed of the motion, I wanted to give you an opportunity to be heard, particularly on a matter that gave me some pause, and that is the issue of prejudice. The plaintiffs allege that there's been undue delay in making the application, and if it were to be granted, it would prejudice the plaintiffs and that that supports determination that the application be denied.

The matter that I wanted to raise, the defendant has claim that there is a prejudice, that there wasn't really delay, and points out that the plaintiffs have not complied with orders issued by the assigned district judge

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2 to have Mr. Rebmann, Sr., the defendant's father,  
3 participate in discovery by being deposed and that that has  
4 delayed the case more than anything. What is the  
5 plaintiffs' position on that? Have the plaintiffs failed  
6 to meet their obligations to the Court by disobeying orders  
7 as alleged by the defendant?

8 MR. HAUSER: Your Honor, at this point, at this  
9 point, Your Honor, there is an order from the district  
10 court judge, from Judge Abrams, just before the case was  
11 reassigned, that indicated that plaintiff's deposition was  
12 to be held within one month after Your Honor decides this  
13 motion.

14 There were a number of things that happened.  
15 There was - Dr. Rebmann's deposition was noted after the  
16 close of discovery. That was discussed with the district  
17 court judge who directed that the deposition go forward.  
18 Dr. Rebmann raised concerns about his inability to travel.  
19 The judge dealt with that in an order that set out certain  
20 conditions allowing for his deposition by telephone.  
21 Before that could happen, the mediation was ordered, which  
22 took place in front of Your Honor. The next thing that  
23 happened was this application by the plaintiffs, and the  
24 district court, in light of this motion, directed that the  
25 time for Dr. Rebmann's deposition be postponed until after

1  
2 the Court rules on this motion. So at this point it's  
3 plaintiffs' position that they're in full compliance.

4           If I could address the issue of prejudice, be all  
5 that it may, discovery on the initial case which relates  
6 simply to the cyber squatting claims, other than Dr.  
7 Rebmann's deposition, is complete. So, in other words,  
8 this case that progressed to the point where but for a  
9 single deposition of the principal of the plaintiffs, the  
10 indirect principal of plaintiffs, discovery was completa  
11 and that as things stand, if the motion to amend is denied,  
12 then that deposition would take place within 30 days and  
13 discovery would be entirely complete.

14           Granting the motion and adding any or all of the  
15 many claims that are here in front of the Court would do a  
16 number of things. First, it would vastly expand the scope  
17 of that particular deposition beyond the issue of the cyber  
18 squatting. Second, it would put the parties in a position  
19 of reopening discovery, interrogatories, document demands,  
20 on an enormous transoceanic discovery effort involving the  
21 records of four or five additional corporate entities in  
22 addition to those of an individual named as a third-party  
23 defendant.

24           All of that, frankly, Your Honor, we believe is  
25 well out of time given all the different scheduling orders

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2 that have been entered in this case, and in terms of time,  
3 in terms of delay, in having the original claims heard. In  
4 terms of the potential cost of dealing with all these  
5 claims, we believe that amounts to prejudice sufficient to  
6 deny the motion.

7 THE COURT: Mr. Goldman, do you want to be heard?

8 MR. GOLDMAN: Yes, I do, Your Honor. The record  
9 before Judge Abrams, including the orders of Judge Abrams,  
10 paint an entirely different picture. Okay? It's important  
11 to note that Judge Abrams specifically allowed Matthias  
12 Rebmann, the son, time to, you know, retain counsel to  
13 advise him on his counterclaims and to file those  
14 counterclaims. So I think this was contemplated by the  
15 Court and contem-, you know, and something that Judge  
16 Abrams dealt with.

17 Secondly, on the issue of, you know, compliance  
18 with the judge's order, which was your question, the answer  
19 is they did not comply. They did not comply on at least  
20 two prior occasions and, in fact, took retaliatory actions  
21 instead of complying. So instead of coming for a  
22 deposition in a lawsuit that they started and which, you  
23 know, in which they're arguing they need relief with some  
24 sort of urgency, Dr. Rebmann could not come to the United  
25 States, he said, so Judge Abrams said, fine, provide proof

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2 that you can't come, and he failed to do that as well. So,  
3 you know, in my book that involves ignoring the Court's  
4 orders. The only - and disobeying the Court's orders.

5 And then Matthias Rebmann moved for sanctions, and  
6 the response to the move for sanctions was to take away  
7 Matthias' shares in the company. So, you know, this just  
8 happened right, you know, in 2013. These are acts where we  
9 couldn't have amended earlier because the actions didn't  
10 have happen earlier and they were taken in direct response  
11 to Matthias looking for sanctions for Dr. Rebmann  
12 disobeying the Court's orders.

13 So, fine, Judge Abrams gave Matthias time to  
14 locate counsel and file counterclaims and said the  
15 deposition will take place within 30 days afterwards. That  
16 doesn't put the other side in compliance with court orders.  
17 It doesn't put them in a position to claim that after many,  
18 many months they, you know, where they refused to show up  
19 for depositions or comply with two court orders, that they  
20 can show up and say we're in compliance and, by the way,  
21 we're being prejudiced.

22 I just don't see where there is a prejudice, and I  
23 think that they're arguing against, you know, very  
24 fundamental rights that are given to all litigants. It's a  
25 right to a level playing field and to have all

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2 controversies in the matter decided in one court and in one  
3 proceeding. And their entire argument is, well, we should  
4 be able to decide which claims get heard.

5           In other words, if we take action against Matthias  
6 in connection with the termination of his employment, the  
7 court can only go into the claims we brought. It can't go  
8 into the claims in the other direction. And Matthias I  
9 think has very, very good reason and excuse for not  
10 bringing these claims earlier, and the first reason is, as  
11 I mentioned before, a lot of the retaliatory acts that we  
12 are complaining of didn't take place until 2013. And the  
13 second thing is, as Judge Abrams recognized, he needed  
14 counsel to advise him on bringing those claims.

15           THE COURT: All right, thank you. I was not  
16 unmindful that some of the delay in moving forward was  
17 occasioned by the withdrawal of earlier counsel for the  
18 defendant, his status as a pro se litigant for a while, and  
19 then the arrival of new counsel on his behalf.

20           With respect to the defendant's motion, a court  
21 has very broad discretion to allow pleadings to be amended,  
22 and Rule 15 of the Rules of Civil Procedure makes that  
23 point quite clear in urging that amendments be freely  
24 allowed when justice requires.

25           In this instance, I've reviewed the proposed



1  
2 amended pleading, and in connection with the reply papers  
3 that the defendant submitted, which acknowledge in many  
4 instances that the proposed document as crafted leaves much  
5 to be desired in that issues respecting jurisdiction, both  
6 subject matter and personal, are not flushed out, as the  
7 plaintiff highlights it, and seemingly could be. There are  
8 other matters, for instance, the claim that jurisdiction,  
9 long-arm jurisdiction is not being asserted under the  
10 theory the plaintiff attacked but under C.P.L.R. 302(a)(1)  
11 and (3) which is not clearly articulated in the proposed  
12 amended pleading.

13           Typically, the reply is not a place to raise  
14 things for the first time and try to do what should have  
15 been done in the first cut of an application, but there are  
16 occasions when that could be overlooked, and I'm informed  
17 in that regard at least by one case, Madison Maidens Inc.  
18 v. American Manufacturers Mutual Insurance Company, which  
19 is found at 2006 W.L. 785270, a 2006 case coming out of  
20 this court.

21           On the whole I'm also very, very mindful that the  
22 Supreme Court has instructed that leave to amend, though  
23 liberally granted, may properly be denied for undue delay,  
24 bad faith, or dilatory motive on the part of the movant,  
25 repeated failure to cure deficiencies by amendments

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2 previously allowed, undue prejudice to the opposing party  
3 by virtue of allowance of the amendment, futility of the  
4 amendment, etc., and that, of course, is the now well-known  
5 case, Bowman v. Davis, 371 U.S. 178 (1962) case from the  
6 Supreme Court.

7           In the instant matter, I think that it is  
8 appropriate given the arguments made in the submissions and  
9 what I've heard today from you to permit the defendant to  
10 amend the answer, but the proposed amendment will have to  
11 be recrafted to address more particularly the deficiencies  
12 that I mentioned a moment ago, the jurisdiction, both  
13 subject matter and personal, pointing clearly to cases  
14 that, or rather statutes that are involved. There is a  
15 reference to a New Jersey statute. There are conflict of  
16 law matters that need to be addressed because that issue  
17 will determine whether some of the contract claims, breach  
18 claims can survive or whether they're futile. But I think  
19 on the whole exercise in the court's discretion to allow  
20 the defendant to submit an amended pleading, not the  
21 proposed one, because, as I said, it has deficiencies that  
22 need to be addressed and the defendant has acknowledged  
23 that in the reply, and I would expect a pleading to come  
24 that addresses all of the deficiencies that had been  
25 highlighted in the papers.

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So the application to amend made by the defendant is granted. Thank you very much. Good day.

MR. HAUSER: Your Honor.

THE COURT: Yes.

MR. HAUSER: Your Honor, this is Greg Hauser for the plaintiffs. Two things. One, could we ask for the Court to set a date by which the defendant must submit the new amended pleading --

THE COURT: Certainly.

MR. HAUSER: -- to -- and, two, could we ask for an extension of the deadline for the deposition until sometime after the actual amended pleading is in our hands because it seems to me that it is the pleading we have not yet seen that will end up having to be one of the bases for the scope of the deposition, and it would not -- it could potentially be problematic to try to have to hold the deposition in the next 30 days when we haven't even seen the amended pleading.

THE COURT: Well, given the reply, it seems to me that defendant should be in a position very quickly to address a new pleading, a new amended pleading, if you would, not the proposed one, one that addresses the deficiencies that exist in the proposed document. That should not be an onerous exercise for the defendant. So

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I'll fix a week's time, a week from today, for the newly crafted based upon the discussion we've had this morning. The newly crafted amended answer to be filed. So that would bring us to the 13<sup>th</sup> day of February.

And I will allow you, the two of you, to have a discussion about a what a reasonable time for the deposition would be, given whatever your respective schedules are, recognizing that the amended document will come on the 13<sup>th</sup> of February. You can submit to me a proposed order for a timeframe for the deposition once you've had it in hand, had a discussion about what's reasonable and appropriate given your respective responsibilities to your clients, both in this case and in other cases.

MR. GOLDMAN: Your Honor.

THE COURT: Yes.

MR. GOLDMAN: Yeah, this is Sam Goldman. I just want to clarify one thing, which is we will submit our amended answer a week from today. At that point, it would appear that it might make sense to get a response from the other side and then for us to at least have an opportunity to have some documentary discovery and then to have the deposition. I just want to make sure that we're working as efficiently as possible. So I'm --

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(interposing)

THE COURT: I'm contemplating that, that's why I suggested that you have a conversation and then come to me with a proposed order. That should be part of your conversation.

MR. GOLDMAN: Thank you.

THE COURT: All right, good day.

MR. HAUSER: Thank you.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Gable versus SA Midtown, et al., was prepared using digital transcription equipment and is a true and accurate record of the proceedings.

Signature\_\_\_\_\_

Date: February 25, 2014